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HUSSIN MOHAMAD v. PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
ZAKARIA SAM JCA

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[CRIMINAL APPEALS NO: W-05-302-10-2014 & W-05-312-11-2014]
18 MAY 2015

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CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in 72.2g methamphetamine – Appeal against conviction and sentence – Role of informer – Whether assumed mantle of agent provocateur – Whether agent provocateur played an active role – Failure to call informer as witness or offered to defence – Whether identity of informer disclosed – Whether a material witness – Whether adverse inference under s. 114(g) Evidence Act 1950 invoked – Whether credibility of agent provocateur rebutted – Whether photographs or search list*

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tendered to establish place where drugs found – Whether trial judge assessed credit-worthiness of agent provocateur – Whether conviction and sentence affirmed

CRIMINAL PROCEDURE: *Witness – Material witness – Trafficking in 72.2g methamphetamine – Informer – Whether assumed mantle of agent provocateur – Whether identity of informer disclosed – Failure to call as witness or offer him to*

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defence – Whether adverse inference under s. 114(g) Evidence Act 1950 invoked – Wan Yurillhami Wan Yaacob & Anor v. PP

The appellants in both the suits were charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 for trafficking in 72.2g of methamphetamine. The prosecution's case was based on the evidence of the agent provocateur ('SP4'). SP4 alleged that he was introduced to the first appellant through an informer, one Aboy. It was asserted that the informer called the first appellant and informed him that he was at 7 Eleven in Jalan Imbi. SP4 testified that a negotiation took place in the first appellant's taxi about the purchase of 200g of syabu for the sum of RM28,000. SP4 narrated that when the first appellant saw the money, the latter made a telephone call and shortly thereafter, the second appellant arrived and got into the taxi. The second appellant then took out a plastic packet from his left socks which contained the dangerous drugs. However, *vide* their defence, the appellants denied being in the taxi or dealing with SP4 in relation to the said drugs. The first appellant's version was that the informer/Aboy had called him several times in relation to a loan matter. On the material day, the first appellant claimed that he saw Aboy and SP4 standing in front of his taxi. Thereafter, SP4 identified himself as a police officer and inspected the first appellant's identification card. At that point in time, the second appellant, who wanted the first appellant to drive him to a particular destination, arrived and SP4 instructed the second appellant to show his passport. Thereafter, both the appellants were arrested. The High Court Judge found the appellants' defence was a mere denial and therefore, convicted and sentenced them to death. Hence, this appeal. It was argued, *inter alia,* that (i) the informer had assumed

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the mantle of an agent provocateur; (ii) the informer had exceeded his role wherein he had immersed himself in the sting operation by placing an order for the dangerous drugs on behalf of SP4; (iii) the informer should have been called by the prosecution or at least offered to the defence; (iv) the identity of the informer had been disclosed by SP4 and the informer was a material witness who could either verify or deny the prosecution's version; (v) SP4 was found not to be a credible witness in another drug trafficking case ('the *Bird*'s case') where he had also acted as an agent provocateur; (vi) the credit-worthiness of SP4 had been rebutted; and (vii) it was not sufficient for the trial judge to simply reject the evidence of the defence witnesses and accept the evidence of SP4 without assessing the facts before him in relation to SP4's credibility.

Held (allowing appeals; setting aside decision of the High Court)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) The agent provocateur did not play an active role in the commission of the offence. There was no communication or negotiation between the agent provocateur and the first appellant on the amount of drugs to be supplied and the price of the drugs prior to the day and time stated in the charge. Further, SP4 was not in communication with the first appellant prior to the raid. The fact that SP4 brought the exact amount of money showed that the price had been agreed upon earlier on between the informer and the first appellant. SP4 was merely taking delivery of the drugs *(Wan Mohd Azman Hassan @ Wan Ali lwn. PP;* refd). (paras 15 & 16)

(2) This was not a case where the informer merely arranged for an introduction and meeting between SP4 and the first appellant and then disappeared. This was a case where the informer had taken an active role in placing the order and agreeing on the price. The informer had communicated with the first appellant on the place of delivery. Therefore, the informer had exceeded his role as an informer and assumed the mantle of an agent provocateur. Further, the failure of the prosecution to call or to offer the informer to the defence had compromised the prosecution's case and had attracted the adverse inference under s. 114(g) of the Evidence Act 1950. The informer was available at all material times, particularly when his identity had been disclosed as Chan Boon Tat, also known as Aboy and/or Ah Long and SP4 confirmed that the informer was being detained at the Sungai Buloh prison (*Wan Yurillhami Wan Yaacob & Anor v. PP*; foll). (paras 17-19)

(3) The credibility of witnesses is essentially a matter for the trial judge. However, the trial judge failed to direct his mind to the fact that as in the *Bird*'s case, SP4 had blatantly disregarded the protocol in the transaction, which raised questions on his credibility. There was no reason as to why SP4 could not adhere to the protocol if the raid was an official raid. (paras 22 & 23)

(4) Generally, there would have been a seizure of the items from where the drugs were found. On the fact, no socks were seized. Neither were there any photographs of the socks taken from where the drugs were allegedly found. Even the search list did not state that the drugs were found or recovered from the socks. The absence of any evidence on the socks and the absence of any evidence in the contemporaneous documentary evidence on where the drugs were found had left a doubt on whether the drugs were indeed taken out by the second appellant from the socks. Further, the records from the appellants' phone logs were not produced to support the prosecution's version. (paras 24 & 25)

(5) SP4's evidence of what transpired in the taxi lacked corroboration and the trial judge failed to address the issues raised by the defence. There was no judicial appreciation on the issues raised, warranting appellant intervention. The credit worthiness of SP4 had been rebutted and based on the evidence in totality, the convictions of the appellants were unsafe. (paras 26 & 27)

Case(s) referred to:
Chai Tee Keiong v. PP [2013] 1 LNS 975 CA ***(refd)***
Wan Mohd Azman Hassan @ Wan Ali lwn. PP [2009] 1 LNS 776 CA ***(refd)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 40A(1)
Evidence Act 1950, s. 114(g)

(Criminal Appeal No: W-05-302-10-2014)
For the appellant - Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Samihah Rhazali; DPP

(Criminal Appeal No: W-05-312-11-2014)
For the appellant - Sangeet Kaur Deo, Zaleha Al-Hayat & Jeremy Vinesh Anthoy; M/s Karpal Singh & Co
For the respondent - Samihah Rhazali; DPP

[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45A-68-11-2011 (overruled).]

Reported by Kumitha Abd Majid

JUDGMENT

Tengku Maimun Tuan Mat JCA:

Introduction

[1] Both the appellants were charged in the High Court at Kuala Lumpur for the following offence:

> Bahawa kamu bersama-sama pada 20/07/2011 jam lebih kurang 9.45 malam, Jalan 1/77B, Off Jalan Imbi, di dalam Daerah Dang Wangi, Bandaraya Kuala Lumpur, Wilayah Persekutuan, telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 72.2 gram, dan dengan

itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama di baca bersama seksyen 34 Kanun Keseksaan.

[2] The appellants were both convicted and sentenced to death by the High Court. Aggrieved by the decision, the appellants filed separate appeal to the Court of Appeal. We heard both the appeals together, at the end of which we unanimously allowed the appeals. Our reasons now follow.

The Prosecution's Case

[3] In brief, the prosecution's case hinged on the evidence of the agent provocateur, Insp Luther bin Nurjip @ Andrew (SP4). In essence the evidence of SP4 was that, through his informer, he was introduced to the first appellant. On the material day and time as in the charge, SP4 said that in the first appellant's taxi, he had negotiated with the first appellant for the purchase of 200g of syabu at a total price of RM28,000. Upon the first appellant having sight of the money, SP4 said that the first appellant made a telephone call and shortly thereafter, the second appellant arrived and got into the taxi. From his left sock, the second appellant took out a plastic packet containing the drugs.

[4] Upon analysis by the chemist, Muzaiyah bt Mohd Kaprawi (SP3), the drugs were confirmed to be 72.2g of methamphetamine.

The Defence Case

[5] The defence version can be summarised as follows. On the day in question, the first appellant was driving the taxi when he received a telephone call from one Aboy, a money lender to whom the first appellant owed some money. When the first appellant reached Jalan Imbi, he stopped at 7-Eleven to buy cigarettes. On his way to 7-Eleven, he received a telephone call from the second appellant asking him to send the second appellant to Kg Malaysia. He informed the second appellant that he was at Jalan Imbi. When the first appellant got back to his taxi, he found two men standing in front of the taxi. One of them was Aboy and the other was unknown to him. The unknown man was later identified as SP4.

[6] According to the first appellant, SP4 identified himself as a police officer and has asked for the first appellant's identity card. At that point of time, the second appellant arrived. SP4 had also asked the second appellant to show his passport. Thereafter policemen in plain clothes came and the appellants were arrested. Both the appellants denied being in the taxi and having any dealing with SP4 as regards the dangerous drugs.

[7] The learned trial judge found the defence to be a mere denial and had not raised a reasonable doubt on the prosecution's case. The appellants were therefore convicted and sentenced to death, hence the appeal.

A **The Appeal**

[8] Before us, learned counsel for the first appellant canvassed only one issue, namely that the informer had assumed the mantle of an agent provocateur and the failure of the prosecution to offer or call him had compromised the case for the prosecution.

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[9] Relying on *Wan Mohd Azman Hassan @ Wan Ali lwn. PP* [2009] 1 LNS 776; [2010] 2 AMR 834; and *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17, learned counsel submitted that in the instant case, the informer had exceeded his role of merely giving information wherein the informer had immersed in the sting operation by placing an order for the 200g of methamphetamine, on behalf of SP4.

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[10] The informer, argued learned counsel, should have been called by the prosecution or at least offered to the defence. The identity of the informer had been disclosed by SP4 and the informer is a material witness who could either verify or deny the prosecution's version.

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[11] For the second appellant, learned counsel took issue on the credibility of SP4. As a brief background, in a drug trafficking case in High Court 2, Kuala Lumpur (No. 45A-13-05-2012), where SP4 had also acted as an agent provocateur (the *Bird*'s case), SP4 was found to be not a credible witness. His credibility was impeached and the decision of the High Court in the *Bird*'s case was affirmed by the Court of Appeal.

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[12] Learned counsel for the second appellant submitted that the decision in the *Bird* case supported their argument that the credit worthiness of an agent provocateur can be rebutted despite the provisions of s. 40A(1) of the Dangerous Drugs Act 1952 and that in the instant case, the credit worthiness of SP4 had been rebutted.

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[13] Learned counsel for both the appellants had also adopted the submissions of the other.

G **Findings**

The Informer

[14] On the issue of the informer, it is useful to reproduce the judgment of the Federal Court in the case of *Wan Mohd Azman* (*supra*), where Abdull Hamid Embong FCJ said:

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> [9] In a typical police undercover operation scenario (as happened in this case), the police would receive information from its informer of a drug trafficking activity. An agent provocateur, normally himself a police officer, will then be assigned to undertake what is called a "sting operation". The agent provocateur will get in touch with the informer. The informer will then arrange for an introduction and meeting between the agent provocateur, (who will play the role of a drug-buyer) and the drug trafficker. The informer will take no further active role and normally

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disappear. Negotiations will then take place between the agent provocateur and the drug trafficker where the amount of drugs to be supplied, its price and place of delivery will be discussed and agreed upon. The agent provocateur himself thus takes an active role in the commission of the offence. ...

[15] In the instant case, the agent provocateur did not play an active role in the commission of the offence. There was no communication or negotiation between the agent provocateur and the first appellant on the amount of drugs to be supplied and on the price of the drugs prior to the day and time stated in the charge. This was reflected in the following evidence of SP4 at p. 40 of the appeal record vol. 1:

A: Sumber memaklumkan bahawa pada suatu masa lelaki Pakistan itu boleh menyediakan hingga 200 gram dadah syabu. Saya beri arahan kepada sumber agar sumber membuat pesanan kepada lelaki Pakistan tersebut dan beritahu lelaki Pakistan itu selepas order dan ambil barang boss akan turun sendiri ambil barang tersebut.

Q: Apa maksud "boss"?

A: Saya bertindak sebagai boss.

And at p. 45 of the appeal record vol. 1, SP4 further stated that:

A: Dalam teksi itu, dia tawarkan saya dadah syabu 200 gram. Setiap 50 gram berharga RM7000,00. Untuk 200 gram berharga RM28,000.00. Kemudian dia telah minta saya tunjukkan wang dan beritahu jika dia nampak wang itu, dia akan tunjukkan dadah syabu. Kemudian saya mengeluarkan wang sebanyak RM28,000.00. Sebaik saya buka beg dan tunjuk kepada Husin RM28,000.00 dalam paper bag itu.

[16] SP4 had said that he brought RM28,000 for the 200g of syabu. This was consistent with the price of RM7,000 per 50g. It must be emphasised that SP4 was not in communication with the first appellant prior to the raid itself. In our judgment, the fact that SP4 had brought the exact amount of money showed that the price had been agreed upon earlier on between the informer and the first appellant. Put in another way, the negotiations for the amount and price of the drugs had been finalised or completed between the informer and the first appellant. Our view is fortified by the evidence of SP4 that he was merely taking delivery of the drugs.

[17] From the above, it was thus clear that this was not a case where the informer merely arranged for an introduction and meeting between SP4 and the first appellant and then disappeared, but this was a case where the informer had taken an active role in placing the order and agreeing on the price. It was also the informer who had communicated with the first appellant on the place of delivery. We therefore agreed with learned counsel for the first appellant that the informer had exceeded his role as an informer and had assumed the mantle of an agent provocateur.

[18] The law on an informer and agent provocateur has been spelt out in a number of authorities. Suffice if we refer to *Wan Yurillhami Wan Yaacob* (*supra*), where Zulkefli Makinudin FCJ (as he then was) speaking for the Federal Court said that:

> [16] ... the position in law in relation to ss. 40 and 40A of the Act is well settled and clear. The informer is protected from giving evidence whilst an agent provocateur is not protected. In other works, if a person is only an informer, the prosecution is not required to call him as a witness or offering him to the defence. An informer is protected under s. 40 of the Act. On the other hand if a person is an agent provocateur, he is required to give evidence in court as a prosecution witness and if he is not called he has to be offered and make available to the defence. Failure to comply with his requirement will attract the application of adverse inference under s. 114(g) of the Evidence Act against the prosecution.

[19] Applying the above principle to the facts of the instant appeal, we found that the failure of the prosecution to call or to offer the informer to the defence had compromised the prosecution's case and had attracted the adverse inference under s. 114(g) of the Evidence Act 1950. Particularly when the identity of the informer had been disclosed as Chan Boon Tat, also known as Aboy and/or Ah Long and at all material times, the informer was available. SP4 had confirmed that the informer was being detained at Sg Buloh prison.

Credibility Of SP4

[20] The trial judge had made a finding that SP4 was a credible witness. For convenience we reproduced the relevant finding of the learned trial judge:

> 3. Tak dinafikan kredibiliti SP4 Inspektor Luther telah diimpeach di Mahkamah Tinggi Jenayah 2 Kuala Lumpur. Namun impeachment itu tidak boleh dipakai di Mahkamah Tinggi ini. Rujuk S Augustine Paul - Impeachment Proceedings. CLJ muka surat 35 berbunyi "where the credit of a witness has been impeached in one case, there is no justification for a Court to consider that fact in evaluating the credibility of the same witness in another case. The issue must be decided by the Court on the evidence before it".
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> ... Mahkamah menerima keterangan SP4 dan mendapati beliau adalah saksi yang kredibel dalam kes ini.

[21] Indeed it was not the complaint of learned counsel for the second appellant that the trial judge had failed to consider that SP4's credibility had been impeached in another court. The complaint of learned counsel was that it was not sufficient for the learned trial judge to simply reject the evidence of the defence witnesses and to accept the evidence of SP4 without assessing the facts before him in relation to the credibility of SP4.

[22] We were mindful of the principle that credibility of witnesses is essentially a matter for the trial judge. However, on the facts of this case, we found merits in the complaint of learned counsel. Confronted with the challenge by the defence as to the credibility of SP4 and given that the presumption of credit worthiness of an agent provocateur is rebuttable (see *Wan Mohd Azman*, (*supra*)), we agreed with learned counsel that the learned trial judge ought to have assessed the following facts which were before him, in relation to the credibility of SP4, which His Lordship failed to do:

(i) SP4 admitted that in the *Bird*'s case, he had purchased drugs with the informer's money and he had given the drugs to the informer and that he had himself engaged in drug trafficking in the course of the *Bird*'s case;

(ii) SP4 had stated in the *Bird*'s case that the flash roll would be obtained from Bukit Aman and that the amount taken for each project will be recorded;

(iii) SP4 stated that he had used genuine money in the sum of RM1000 and as for the remainder, he had obtained and used counterfeit money;

(iv) SP4 admitted that the flash roll used in the transaction with the appellants in the instant case was not from Polis Diraja Malaysia (PDRM) and that there was no record of such transaction with PDRM; and

(v) in the instant case, SP4 had disregarded the protocol, which learned counsel submitted, had raised doubts as to whether or not the raid had actually taken place.

[23] We agreed with learned counsel that there was no reason why SP4 could not adhere to the protocol if the raid in this instant case was an official raid. The learned trial judge failed to direct his mind to the fact that as in the *Bird*'s case, in the instant case, SP4 had blatantly disregarded the protocol in the transaction, raising questions on his credibility.

[24] We next examined the evidence of SP4 that the second appellant had taken the packet of drugs from his left socks. We noted that generally, there would have been a seizure of the items from where the drugs were found. In the present case however, no socks were seized. Neither was there any photograph taken of the socks from where the drugs were allegedly found. And the search list did not state that the drugs were found or recovered from the socks either. We further noted that the column "Bagaimana Didapati dan Di Mana Didapati" in the search list (exhs. P15 &16) was left blank. Since it was the defence version that the appellants never got inside the taxi and that the second appellant was not wearing socks and shoes but was wearing slippers instead, the absence of any evidence on the socks and the absence of any evidence in the contemporaneous documentary evidence on where the drugs were found had left a lingering doubt on our minds whether the drugs were indeed taken out by the second appellant from the socks.

[25] SP4 had also given evidence that the informer had called the first appellant, to inform the first appellant that he was at 7-Eleven Jalan Imbi. The first appellant's version was that the informer/Aboy had called him several times as regards the loan. It was further the evidence of SP4 that upon being shown the money, the first appellant made a telephone call to the second appellant. The phones were seized from the appellants but the records of the phone logs were not produced to support the prosecution's version.

[26] We found the evidence of SP4 of what transpired in the taxi lacked corroboration (see *Chai Tee Keiong v. PP* [2013] 1 LNS 975; [2014] 2 MLJ 246) and we found that the learned trial judge had failed to address the issues raised by the defence (see p. 277 appeal record vol. 1). In our judgment, the failure by the learned trial judge to direct his mind to the issues raised resulted in there being no judicial appreciation by the learned trial judge of the issues raised, warranting appellate intervention.

Conclusion

[27] Having regard to all the above, we took the view that the credit-worthiness of SP4 had been rebutted and looking at the evidence in totality, we found the convictions of the appellants unsafe. We unanimously allowed the appeal. We set aside the convictions and sentence imposed by the High Court. The appellants were acquitted and discharged.